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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/702,193

11/05/2003

Russell L. Kelley

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EXAMINER

TRAN, SUSAN T

ART UNIT

PAPER NUMBER

1615

MAIL DATE

DELIVERY MODE

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/702,193	Applicant(s) KELLEY, RUSSELL L.	
	Examiner S. Tran	Art Unit 1618	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 11 August 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-19 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-19 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 08/11/08 has been entered.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-19 are rejected under 35 U.S.C. 102(b) as being anticipated by Reinhart EP 0 678 247 A1.

Reinhart teaches a pet food product comprising fatty acid, *e.g.*, omega-6 and omega-3 in the ratios of from 3:1 to 10:1 (see abstract, and page 2, lines 1-30). The product further comprises fiber, minerals, carbohydrates, 30-34% protein, and 20-23% fat (page 3, lines 13-54). The product can be used to treat and maintain companion animals, such as dogs or cats (page 3, lines 25-31).

Reinhart is silent as to the use of the product for enhancing or promoting reproductive performance. However, products of identical chemical composition cannot

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have mutually exclusive properties. A chemical composition and its properties are inseparable. Therefore, if the prior art teaches the identical chemical structure, the properties applicant discloses and/or claims are necessarily present. *In re Spada*, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990). Reinhart teaches a feed composition comprising the same ingredients in the same amounts. Accordingly, the properties being claimed are inherent. When the claim recites using an old composition and the “use” is directed to a result or property of that composition or structure, then the claim is anticipated. *In re May*, 574 F.2d 1082, 1090, 197 USPQ 601, 607 (CCPA 1978).

Claim Rejections - 35 USC § 103

Claims 1-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Reinhart EP 0 678 247 A1.

Reinhart is relied upon for the reason stated above. Reinhart does not expressly teach using the feed composition for enhancing or promoting reproductive performance. However, absent of evidence to the contrary, the burden is shifted to applicant to show that the feed composition of Reinhart when use to feed companion animals, will not enhance reproductive performance of the animals. This is because Reinhart teaches a feed composition comprising the same ingredients in the same ratios, and because of the overlapping patient population. Thus, one of ordinary skill in the art would have been motivated to, by routine experimentation optimize the feed of Reinhart to enhance the reproductive performance of the animals.

Claims 1-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Reinhart EP 0 678 247 A1, in view of Stitt US 5,110,592 and, Nawar US 6,641,847 or DE 4042354 (DE '354).

Reinhart is relied upon for the reasons stated above. Reinhart is silent as to the use of the product for enhancing or promoting reproductive performance.

Stitt teaches an animal feed blend comprising fatty acid to increase live births and improve the fertility of animals (see abstract, and columns 3-4). Stitt teaches the use of flaxseed in the feed (ID). Stitt does not explicitly teach the present of omega-6. However, it is known in pharmaceutical art that flaxseed contains both omega-3 and omega-6 fatty acid. However, to be more specific, Nawar teaches foodstuff comprising omega-6 (linoleic acid), which promotes reproduction, overall growth, healthy skin, and cardiovascular health (column 7, lines 50 through column 8, lines 1-40).

DE '354 teaches animal feed comprising linoleic acid (omega-6), wherein the feed promotes fertility, improves performance, and glossy coat (abstract). Thus, it would have been obvious to one of ordinary skill in the art to use the food product rich in fatty acid taught by Reinhart to promote fertility/performance/reproduction in view of the teachings of Stitt and Nawar or DE '354 to obtain the claimed invention. This is because Stitt teaches an animal feed rich in fatty acid such as omega-3 fatty acid to promote fertility, because Nawar and DE recognize fatty acid such as omega-6 fatty can also be use to promote fertility, and because Reinhart teaches an animal feed rich in fatty acid to promote an overall health. One of ordinary skill in the art would have been motivated to combine omega-3 and omega-6 to improve

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fertility/performance/reproduction since the prior arts teach using fatty acids including omega-3 and omega-6 to promote fertility in animal is well known in the art.

Response to Arguments

Applicant's arguments filed 08/11/08 have been fully considered but they are not persuasive.

Applicant argues that Reinhart, Stitt, Nawar and DE '354, either alone or in combination, all fail to teach any significance in providing a diet having a specific ratio of omega-6 and omega-3 fatty acids in a companion animal's reproductive performance, maintenance of maternal essential fatty acid status, maintenance of litter size through subsequent parities, increasing live births through subsequent parities, or decreasing still births through subsequent purifies. As noted in the Office Action, Reinhart does not provide any teaching of the use of the combination of omega-3 fatty acids and omega-6 fatty acids, in the ratio as currently claimed, for the reproductive benefits noted above.

However, in response to applicant's argument that *Reinhart does not provide any teaching of the use of the combination of omega-3 fatty acids and omega-6 fatty acids, in the ratio as currently claimed, for the reproductive benefits*, it is noted that Reinhart doe teach the claimed ratios of omega-6 fatty acids to omega-3 fatty acids in a feed composition, useful for feeding companion animals. As discussed above, products of identical chemical composition cannot have mutually exclusive properties. When the claim recites using an old composition and the "use" is directed to a result or property of that composition or structure, then the claim is anticipated. *In re May*, 574 F.2d 1082,

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1090, 197 USPQ 601, 607 (CCPA 1978). Accordingly, the burden is shifted to applicant to show that the feed composition comprising the claimed active agents in the claimed ratios, does not result in the claimed properties, namely, for enhancing reproductive performance in companion animals.

Applicant argues that Stitt discloses omega-3 fatty acids but Stitt, however, is silent with respect to omega-6 fatty acids and provides no teaching as to whether omega-6 fatty acids, in combination with omega-3 fatty acids, in the ratio as currently claimed, will have an impact of the reproductive benefits noted above. Nawar discloses omega-6 fatty acids but Nawar, however, is silent with regards to omega-3 fatty acids, and provides no teaching as to whether omega-3 fatty acids, in combination with omega-6 fatty acids, in the ratio as currently claimed, will have an impact on the reproductive benefits noted above. DE '354 teaches that a composition comprising, among other ingredients, 17% linoleic acid and 50% linolenic acid can promote fertility, but as best understood by Applicants, DE '354 provides no teaching as to whether omega-3 fatty acids in combination with omega-6 fatty acids, in the ratio as currently claimed, will have an impact on the reproductive benefits noted above. As best understood by Applicant, the combination of Reinhart, Stitt, Nawar and DE '354 fails to teach a process for enhancing reproductive performance in a companion animal that involves feeding the animal a diet including omega-6 and omega-3 fatty acids, wherein the ratio of the omega-6 fatty acids to the omega-3 fatty acids is from about 3.5:1 to 12.5:1; or processes for maintaining maternal essential fatty acid status in a companion

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animal; for maintaining litter size through subsequent parities era companion animal; for increasing live births through subsequent parities of a companion animal; or for decreasing still births through subsequent parities of a companion animal, all of which employ such a diet.

However, in response to applicant's arguments, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981). Stitt, Nawar and DE '354 are cited solely for the teachings of using omega-6 as well as omega-3 fatty acids for enhancing reproductive performance is well known in the art.

Correspondence

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Susan T. Tran whose telephone number is (571) 272-0606. The examiner can normally be reached on M-R 6:00 am to 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Woodward can be reached on (571) 272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/S. Tran/
Primary Examiner, Art Unit 1618